MARY SHIM v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) January 15, 1962]

[K.L. — F.M. Criminal Appeal No. 23 of 1961]

Criminal Law and Procedure — Causing miscarriage — Penal Code, s.314 — Discharge at preliminary inquiry — Second preliminary inquiry — Validity of Second Inquiry — Statements by deceased — Admissibility under s.32, Evidence Ordinance, 1950 — Corroboration of deceased's evidence.

A discharge at a preliminary inquiry is no bar to a second preliminary inquiry on the same facts and for the same offence.

Theopillai v. *Public Prosecutor* [1] followed.

Appellant was convicted of an offence punishable under section 314 of the Penal Code, i.e. with doing an act with intent to cause the miscarriage of one Lily Tan which act caused the death of the said Lily Tan. It was argued on appeal that certain statements made by the deceased should not have been admitted by reason of the hearsay rule. Defence counsel also strongly criticised a statement made by the deceased to a Magistrate, evidence on which was admitted, on the ground that it did not contain the *ipsissima verba* of the deceased.

Held: (1) statements made by the deceased were rightly admitted under section 32(a) of the Evidence Ordinance;

(2) though the Magistrate gave evidence a year or so after recording of the statement and his recollection of questions he may have put was impaired, there seemed no reason for thinking that he did not record correctly the actual words of the deceased;

(3) as deceased was an accomplice to the criminal act of abortion, corroboration of her evidence was desirable. Corroboration was to be found in the evidence of visits to the appellant by deceased.

Case referred to:—

(1) *Theopillai* v. *Public Prosecutor* [1956] M.L.J. 177.

COURT OF APPEAL (CRIMINAL). Appeal from the judgment of Adams J. reported in [1961] M.L.J. 314.

David Marshall for the appellant.

Hamzah bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Hill J.A.: We dismissed this appeal at a Special Sitting of the Court at Kuala Lumpur on the 2nd November 1961 and indicated that we would later state in writing our reasons for doing so.

The appellant was tried in the High Court at Muar on the following charge:—

"That you on the 6th day of June, 1960, sometime in the night, at No. 16 Jalan Lama, Muar, in the District of Muar, in the State of Johore, with intent to cause miscarriage of Lily Tan (f) with child, did a certain act which caused the death of the said Lily Tan to wit the insertion of a stick into the womb of the said Lily Tan and thereby committed an offence punishable under section 314 of the Penal Code."

The trial occupied four days, the 11th, 12th, 27th and 28th June and on the 9th August the learned trial Judge delivered a written judgment in which he convicted the appellant on the charge and sentenced her to nine months imprisonment. This appeal is against the conviction and perhaps fortunately for the appellant not also against sentence.

In view of the submissions made by Mr. Marshall, with regard to the preliminary proceedings, before the learned trial Judge and this Court, it is perhaps as well to refer to this aspect before dealing with the trial proper.

On 1st November 1960, a preliminary enquiry was commenced in the Magistrate's Court at Muar. Evidence of two witnesses was recorded and the enquiry was adjourned to the 2nd November. On the resumption the Prosecuting Officer, an Assistant Superintendent of Police, informed the Magistrate that on instructions he was offering no further evidence and requested the Court to discharge the accused. After placing on record, at Mr. Marshall's request, the defence's appreciation on the fairness of the Prosecution the Magistrate discharged the accused not amounting to acquittal. It is perhaps as well to observe here that the words "not amounting to acquittal" were surplusage as the Magistrate had no power to acquit.

It appears that all the prosecution witnesses were present at Court on the 1st and 2nd November, 1960, and the reason for the course taken on the 2nd is not apparent.

In any event on 30th January 1961 the appellant was again before the Court at Muar, this time presided over by a different Magistrate, and eventually on 1st March 1961 a second preliminary enquiry was commenced in spite of vigorous protests by Mr. Marshall.

Mr. Marshall asserted before us that the basic point of his objection to the second preliminary enquiry was that it was oppressive, though he did not go as far as suggesting that it was persecution and not prosecution.

Copies of letters, marked B and C on pages 57 and 58 of the appeal record, written respectively to Messrs. Marshall and Chung by the Attorney-General and to the Magistrate by the Deputy Public Prosecutor shew that the decision to hold a second preliminary enquiry was one taken in the public interest after further consideration of the available evidence.

It appears to us that this decision in the circumstances of this case was a right and proper one in the interests of the administration of justice, a decision that was in the power of the Attorney-General to make, (see *Theopillai* v. *Public Prosecutor* [1]) and one moreover that has been fully justified in the result. Clearly no question of directions or instructions to or interference with a Magistrate by the Attorney-General arose.

To come now to the trial before Adams J. Lily Tan, the deceased, was a young married woman. On the 9th of June, 1960, at about 9.45 p.m. she was admitted to Muar hospital as a result of an abortion. She was treated by a

Lady Medical Officer, coincidentally also named Lily Tan, but her condition worsened and she died on the 13th of June. She died of inflammation of the uterine covering with septicaemia which, in the opinion of the Lady Medical Officer, was the result of septic abortion.

There were therefore two main questions for the learned trial Judge to decide. Was he satisfied with the medical opinion that the primary cause of death was septic abortion and, if he was so satisfied, was that abortion criminally induced by the appellant.

The main prosecution witnesses were the aforementioned Dr. Lily Tan, the deceased's husband, Lim Cheng Fatt, and a pathologist, Peruvanan S. Raman.

Dr. Tan's evidence dealt with the admission of the deceased to hospital on the 9th June and a description of her condition from which the doctor diagnosed that the patient was suffering from septic abortion.

The doctor stated that on the 10th deceased's husband handed her a small, curved piece of wood which she identified in Court and which became Exhibit P.1.

On the same day that the deceased died Dr. Tan performed a Post Mortem examination. In her opinion the deceased had died as a result of a septic abortion and this post mortem finding was in the doctor's opinion consistent with her diagnosis made from the history given to her by the deceased and her husband.

In Dr. Tan's own words as recorded by the learned trial Judge the history given to her by the deceased was as follows:—

"She was two months' pregnant.

On 6.6.60 she told me, she went to a private midwife and asked her to procure an abortion. This was performed upon her. She did not name the midwife to me.

A few hours after returning home she had had an abdominal pain and took tablets which had been given to her by the midwife. Fever started on the 7th, mild getting higher. On 8th June jaundice appeared. Patient came into hospital. No fever or jaundice before this."

Dr. Tan appears to us to have been most admirably frank and impartial. In cross-examination she stated that the medical evidence up to the death was generalized septicaemia of unknown origin if we disregard the history. She could not say without disregarding the history what the cause of the jaundice was, but at the same time stated that the open os 1 finger, which she had already described from her examination of the deceased, confirmed her in her opinion that there had been a septic abortion.

Neither Dr. Tan nor the pathologist found any visible signs of injury indicating an induced or criminal abortion and this was a fact that needed careful consideration by the trial Judge and by this Court.

It was not until the 28th June that Dr. Raman received and examined the uterus of the deceased. He found there was evidence of pregnancy and acute infection of the uterus, but no evidence of any injury to the body of the uterus.

At this point it will be convenient to consider the evidence of deceased's husband. It was he who handed Exhibit P.1. to Dr. Tan and his evidence, which was believed by Adams J. was that this piece of wood had been used to cause the abortion. That this could have happened was Dr. Tan's opinion. She stated: "I seriously suggest that the insertion of P.1. skilfully introduced it could cause abortion without visible injury."

On this point Dr. Raman's evidence is conflicting. In examination-in-chief he stated:

"P.1. could cause an abortion. There need not have been a visible injury to the uterus if P.1. was used. It depends entirely how it was used. If the surface is visualized and the instrument P.1. is well lubricated it is possible that P.1. could induce an abortion without having any signs."

but in cross-examination he stated:

"As a doctor I would say that in my opinion it would not be possible to introduce P.1. into the womb without leaving visible marks."

and again:

"In my view in skilful hands or otherwise the stick P.1. would cause trauma. I do not think you could insert P.1. because it is not long enough. It would be a hit in the dark. I do not think you could get it into the vaginal canal. It would be very difficult to get it out from the womb without leaving trauma. For the deceased herself to extract it herself is well nigh impossible without causing injury."

and finally:

"I think the use of the stick can be ruled out."

At page 108 under the heading Criminal Abortion in *Taylor's* Medical Jurisprudence, Vol. 11, 10th Edition appears the following:

"Abortionists possess varying degrees of skill, from the black sheep of the medical profession (who may perform the deed *secundum artem*), through the midwife (who has some acquaintance with the anatomy of the parts), down to the totally ignorant layman (who is interested in a particular case, but makes no practice of the act).

It is usually quite impossible by strictly medical evidence to detect the activities of abortionists. It can be done only by inquiry into motives, and fees, and surrounding circumstances."

This authority supports the opinion and diagnosis in the circumstances of this case by Dr. Tan.

It is not necessary for us to repeat in any detail the evidence given before the learned trial Judge. The husband told of visits to the appellant after his wife became ill and stated that pills were supplied by the appellant. He also stated that the deceased told him that she had gone to the appellant's house for an abortion and that the appellant had introduced a piece of stick into her womb. He stated that the deceased had eventually removed this stick

herself from her body and that he had kept it and given it to Dr. Tan.

Mr. Marshall objected to evidence of the wife's statements being admitted, but Adams J. admitted them on the ground that they showed a general consistency of statement as to the cause of her death made by the deceased. We consider that this evidence was properly admitted especially in view of section 32 of the Evidence Ordinance, No. 11 of 1950, the relevant portion of which reads as follows:—

"Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases—

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

In addition to the statements made to her husband the deceased had given the history of her illness to Dr. Tan and before she died made a statement to a Magistrate in the hospital. This statement was strongly criticised by Mr. Marshall and chiefly on the ground that it did not contain the *ipsissima verba* of the deceased. The Magistrate gave evidence a year or so after recording this statement and his recollection with regard to questions he may have put was impaired, but there seems no reason for thinking that he did not record correctly the actual words of the deceased. In any event the statements by the deceased to Dr. Tan and the Magistrate were clearly admissible in our opinion in accordance with section 32 of the Evidence Ordinance.

Finally, there remains the question of corroboration of the deceased's statement, or dying declaration, to the Magistrate and to Dr. Tan. Clearly the deceased was an accomplice to the criminal act of abortion and, as such, corroboration of her evidence was desirable and necessary, though the urgency of the need for corroboration was not great in the circumstances present in this case. The learned trial Judge considered the question of corroboration and found it among other things in the visits to the appellant.

Upon consideration of all the evidence Adams J. was satisfied that the accused procured the abortion of the deceased with the stick P.1. and that as a result of that abortion performed upon the deceased the deceased contracted septicaemia and died as a result. With this conclusion we were in entire agreement and saw no reason for interfering.

Appeal dismissed.

Re INDIAN OVERSEAS BANK LTD.'S APPLICATION;

AMERICAN INTERNATIONAL ASSN. CO. LTD. v. HO CHOOI SOON

[O.C.J. (Hepworth J.) January 15, 1962]

[Penang — Originating Summons No. 121 of 1959]

Banking Law — Issue arising from Interpleader Summons — Forged endorsement on misappropriated cheque — Cheque passed by defendant to applicant bank for payment into his account — Cheque uncrossed — Crossed by applicant — Credit given to customer — Discovery of forgery — Customers' account debited — Claim by drawer to ownership of cheque — Customer claiming to be holder in due course — Bills of Exchange Ordinance, 1949, s.32 — Settlement of account between a bank and its customer — What constitutes settlement of account — Bills of Exchange Ordinance, 1949, s.30(2).

Plaintiff drew a cheque, which was uncrossed, for the sum of $3,243.87, in favour of one Mr. Yeo Wee Yang on order. This cheque was misappropriated by a member of their staff in their Penang branch who forged the endorsement of Yeo Wee Yang on the cheque and then gave it to the defendant who deposited it with the applicants in favour of his account with them. Applicants crossed the cheque and having collected on it they duly credited the defendant's account with the amount of the cheque. The defendant then issued his own cheque to the value of the cheque he had received to the person who had forged the indorsement.

Nearly two years later, plaintiffs wrote to the applicants claiming to be true owners of the cheque as the endorsement was a forgery and requesting the applicants to refund to them the amount of the cheque.

The applicant bank made no refund but debited the account of the defendant with the amount of the cheque and then applied for and obtained an Interpleader Summons in which an order was made on February 5, 1960 for pleadings to be filed by plaintiffs and defendant to determine who was entitled to the sum of $3,243.87 held by the applicants ([1960] M.L.J. 286).

The misappropriation and forgery being admitted by all parties the questions before the Court were (i) whether the applicants could lawfully debit the defendant's account with the amount of the cheque on an allegation of forgery made by the plaintiffs after a period of nearly two years and (ii) if they could, (becoming stake holders thereby) whether the plaintiffs or the defendant was entitled to the sum held by the applicants.

Held: (1) whether the applicants could lawfully debit the defendant's account depended upon the question whether there had or had not been a settlement of account between the applicants and the defendant. A lapse of two years would not operate as a bar to such debiting if there was no settlement of account. The evidence did not disclose any settlement of account and therefore applicants were justified in law in debiting the defendant's account. Dictum of Collins L.J. in *Bavins, Junr. & Sims* v. *London & South Western Bank Ltd.* (3) cited and followed;

(2) since the negotiation of the cheque was effected through fraud, section 30(2) of the Bills of Exchange Ordinance, 1949, applied and the burden of proof was on the defendant to show that subsequent to the forgery he had given value in good faith for the cheque. It was not disputed that defendant had given value but on the evidence it was clear that this had not been done in good faith. Consequently, the defendant's claim to be a holder in due course failed;

(3) but even if it could be shown that the defendant took the forged cheque in good faith and for value, plaintiffs could still recover the money because the defendant had not lost his remedy against some previous party by being deprived by lapse of time of the opportunity of giving notice of dishonour.